

58. *Interim Cap on High-Cost Fund.* In 1993, the Commission became concerned about the rapid and erratic pattern of growth in the size of the high-cost loop fund and initiated an inquiry to reevaluate its universal service support mechanism and to consider permanent changes in the manner in which high-cost support would be provided.<sup>119</sup> At that time, the Commission established an interim cap to the universal service fund.<sup>120</sup> The cap was designed to moderate the growth of the fund while the Commission conducted a rulemaking proceeding and to allow for an orderly transition to the new universal service support mechanisms that would be adopted.<sup>121</sup> Under the cap, the total fund for a given year may increase by no more than a percentage equal to the percentage growth nationwide in the number of loops for that year.<sup>122</sup>

59. *May 8, 1997 First Report and Order.* In 1997, the Commission adopted broad revisions to its universal service support mechanisms consistent with the directive of the 1996 Act to ensure that universal service support mechanisms be explicit, sufficient, and sustainable as local competition develops. The Commission established a plan for providing high-cost support through the explicit federal universal service support mechanism rather than the interstate access charge rate structure<sup>123</sup> and a methodology for determining high-cost support based on the forward-looking economic cost of providing the supported services to a particular service area.<sup>124</sup>

60. Currently, all carriers receive high-cost support based upon the high-cost support mechanisms which pre-date the 1996 Act. As discussed above, non-rural carriers will begin

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area for a previously unserved area; (b) a company is combining previously unserved territory with one of its existing study areas in the same state; and (c) a holding company is consolidating existing study areas in the same state. *American Samoa Government and the American Samoa Telecommunications Authority: Petitions for Waivers and Declaratory Rulings to Enable American Samoa to Participate in the Universal Service High Cost Support Program and the National Exchange Carrier Association Pools and Tariffs*, Order, CC Docket No. 96-45, AAD/USB File No. 98-41, DA 99-1131 (Acct. Pol. Div., Com. Car. Bur. Rel. June 9, 1999) (American Samoa); *Guam Telephone Authority, Petition for Declaratory Ruling*, Report and Order, AAD 97-27, DA 97-595 (Acct. Aud. Div. rel. March 21, 1997) (*Guam Study Area Waiver Order*). In evaluating petitions seeking a study area waiver, the Commission uses a three-pronged standard: (1) the change in study area boundaries must not adversely affect the high-cost loop fund; (2) the state commission(s) having regulatory authority over the exchange(s) to be transferred must not object to the change; and (3) the public interest must support such a change. *Guam Study Area Waiver Order* at para. 3. With respect to not adversely affecting the high-cost loop fund, we have required that study area waivers for a single carrier shall not increase total universal service support by more than one percent. See *US West Communications, Inc. and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1774 at para. 14 (1995), aff'd on recon, 12 FCC Rcd 4644 (1997).

<sup>119</sup> *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Notice of Inquiry, FCC 93-435 (rel. Sep. 14, 1993).

<sup>120</sup> *Id.*

<sup>121</sup> See *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision, 9 FCC Rcd 334 (1993); Report and Order, 9 FCC Rcd 303 (1993) (establishing interim cap); Report and Order, 11 FCC Rcd 1077 (1995) (extending cap through July 1, 1996); Report and Order, 11 FCC Rcd 7920 (1996) (extending the cap until the final rules implementing the 1996 Act provisions become effective).

<sup>122</sup> 47 C.F.R. § 36.601(c).

<sup>123</sup> See *First Report and Order*, 12 FCC Rcd at 8926-47.

<sup>124</sup> *First Report and Order*, 12 FCC Rcd at 8898-8926. In using the term "forward-looking economic cost," we mean the cost of producing services using the least cost, most efficient, and reasonable technology currently available for purchase with all inputs valued at current prices.

receiving high-cost support based on forward-looking costs on January 1, 2000.<sup>125</sup> The Commission intends that rural carriers also will receive support based on forward-looking costs, but only after further review by the Commission, the Joint Board, and the Rural Task Force appointed by the Joint Board, and in no event before January 1, 2001.<sup>126</sup>

61. Until a carrier receives high-cost support based upon forward-looking costs, that carrier's support will be determined on the basis of whether the carrier is an incumbent LEC<sup>127</sup> or a competitive eligible telecommunications carrier. A competitive eligible telecommunications carrier is defined in our rules as an eligible telecommunications carrier that does not meet the definition of incumbent LEC. A competitive eligible telecommunications carrier receives the same amount of support per customer that the incumbent LEC previously serving that customer received.<sup>128</sup>

### ***2. Federal Share of High-Cost Support***

62. As discussed above, because the trust relationship creates a unique relationship between the federal government and Indian tribes, the federal government may have authority to undertake additional measures to promote deployment and subscribership on tribal lands and to provide universal service support necessary to offset the particular challenges facing these areas. With respect to high-cost support on tribal lands, we seek comment on the extent to which states currently support the costs of universal service in tribal lands and whether the Commission should provide an additional portion of the universal service support calculated by the federal support methodology in high-cost, tribal lands. For instance, with regard to the forward-looking high-cost support mechanism for non-rural carriers, we seek comment on whether, rather than providing support for costs that exceed both a national cost benchmark and the individual state's resources to support those costs, the mechanism should provide support for all costs in unserved tribal lands that exceed the national benchmark.

### ***3. Separate Study Areas Option for Tribal Lands***

63. In order to provide additional high-cost support to tribal lands, we seek comment on modifications to our study area rules. Our study area rules provide a mechanism through which the Commission has controlled the growth of the high-cost universal service support mechanism. Universal service support for high-cost areas is determined on the basis of average loop costs

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<sup>125</sup> *Federal-State Joint Board on Universal Service, Access Charge Reform*, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket 96-45; Fourth Report and Order in CC Docket No. 96-262; and Further Notice of Proposed Rulemaking in CC Docket Nos. 96-45, 96-262, FCC 99-119 (rel. May 28, 1999).

<sup>126</sup> *Thirteenth Order on Reconsideration*, FCC 99-119 at paras. 21, 129. See also *First Report and Order*, 12 FCC Red at 8889, para. 204, 8910, para. 245, 8917-18, paras. 252-56; *Federal-State Joint Board on Universal Service Announces the Creation of a Rural Task Force, Solicits Nominations for Membership on Rural Task Force*, Public Notice, FCC 97J-1 (rel. Sept. 17, 1997).

<sup>127</sup> For purposes of its universal service rules, the Commission adopted the Act's statutory definition of incumbent LEC. See 47 C.F.R. § 54.5; 47 C.F.R. § 51.5; 47 U.S.C. § 251(h)(1). An incumbent LEC is defined in the Act as a LEC that, with respect to an area: (1) provided telephone exchange service in such area on February 8, 1996, the date of enactment of the 1996 Act, and (2) was a member of NECA on February 8, 1996, or became such member's successor or assign.

<sup>128</sup> 47 C.F.R. § 54.307.

throughout a study area. Averaging costs on a study-area wide basis spreads the burden of serving high-cost areas among all of the telecommunications subscribers in that study area. As a result, however, carriers with relatively low average loop costs in a particular study area receive no support for serving additional customers in a high-cost portion of that study area if the loop costs in the high-cost portion do not raise the overall average loop costs for the study area above a specific national benchmark, currently 115% of the national average cost per loop.<sup>129</sup> By freezing study area boundaries, the Commission sought to eliminate incentives for carriers to place high-cost exchanges in separate study areas in order to receive additional support for providing service to those study areas. As a result of these two policies, however, certain carriers may experience strong financial disincentives to serving unprofitable high-cost customers in their study areas and other carriers may lack incentives to purchase those unserved exchanges.

64. In order to promote the deployment of universal services on tribal lands, we seek comment on modifying our rules to permit carriers to treat tribal lands<sup>130</sup> as a distinct study area.<sup>131</sup> We seek comment on whether, by providing an exception to our study area rules, we can eliminate regulatory requirements that may deter carriers from serving high-cost, tribal lands. For example, one option may be that the tribal study area for a carrier will consist of all of the tribal lands served by the carrier within the borders of a single state. This means that carriers may have a tribal study area in each state in which it provides service on tribal lands. We seek comment on whether the tribal study area should include all of the tribal lands in a state (rather than, for example, a single nationwide tribal study area) because states use study areas for purposes of determining intrastate revenue requirements.

65. We emphasize that the proposal to allow tribal study areas is not related to the issue of the area over which costs are averaged to determine support using the new high-cost mechanisms, which is pending in the high-cost proceeding.<sup>132</sup> We seek comment on how allowing a separate tribal study area could affect whether the carrier serving that area falls within the statutory definition of a rural carrier for providing service to that area. If a carrier designates the tribal lands within a state as a separate study area, the number of access lines or inhabitants in that newly created study area may qualify the carrier as a rural carrier with respect to that study area.<sup>133</sup> We seek comment on whether this may result in some carriers, currently designated as non-rural, being considered rural for purposes of receiving universal service support in certain tribal study areas.

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<sup>129</sup> See *Thirteenth Order on Reconsideration* at para. 98.

<sup>130</sup> For a discussion of the possible definitions of "tribal land", see para. 50, above.

<sup>131</sup> This exception would not affect the requirement that, for a rural carrier, its service area is defined to mean their study area. See 47 U.S.C. § 214(e)(5). Rural carriers, like other carriers, may have study areas in multiple states. As a result of the rule change, they now may have study areas in multiple states and on tribal lands. For rural carriers, the service area for purposes of determining universal service obligations and support, continues to be their study areas.

<sup>132</sup> See *Thirteenth Order on Reconsideration* at V.B.2.

<sup>133</sup> See 47 U.S.C. § 153(37) (cited in n. 10, above).

#### 4. *Interim Cap on the High-Cost Fund*

66. In the *First Report and Order*, the Commission concluded that it would maintain the cap on the existing high-cost loop support mechanism until all carriers receive support based on the new high-cost funding mechanism.<sup>134</sup> The cap on the high-cost loop fund was initially intended as an interim measure.<sup>135</sup> Commission rules require that if total support, based on each carrier's actual costs, is above the total allowed capped amount, each recipient of high-cost loop support will receive a reduced amount of support to keep the total fund at the capped amount.<sup>136</sup> The cap has served its purpose in controlling excessive growth in the size of the fund during the past six years as the Commission has reformed its universal service support mechanisms. We have stated that the rural carriers will receive support based on the new high-cost funding mechanism no earlier than January 1, 2001. The Commission has not established a timetable for moving rural carriers to a forward-looking high-cost support mechanism. Rather, this undertaking is on hold pending the Rural Task Force making its recommendation to the Joint Board; the Joint Board may recommend that the Commission conduct further proceedings on certain issues.

67. Allowing carriers to designate separate tribal study areas, as proposed above, could mean that additional carriers may be entitled to a portion of the high-cost support fund. We seek comment on the need for the Commission to provide additional high-cost support under the existing mechanisms to tribal lands. In order to do so, the Commission may either lift the cap on the high-cost fund to allow for growth in the size of the fund attributable to the separate study area proposal or reallocate the existing funds among the expanded category of recipients. We seek comment on these options. We also seek comment on any other options that may assist the Commission in achieving the goal of targeting additional federal high-cost support to tribal lands.

#### D. Revisions to Lifeline

68. The Commission's Lifeline support program for low-income consumers is designed to reduce the monthly billed cost of basic service for low-income consumers, which we anticipate will increase telephone penetration. Lifeline provides carriers with three elements of universal service support.<sup>137</sup> The support must be passed through to each qualifying low-income consumer by an equivalent reduction in his or her monthly bill for telephone service. All carriers receive a baseline amount of \$3.50 per month per Lifeline customer in the form of a waiver of the federal subscriber line charge (SLC).<sup>138</sup> An additional \$1.75 per month is available per Lifeline customer if "the state commission approves an additional reduction of \$1.75 in the

<sup>134</sup> *First Report and Order*, 12 FCC Rcd at 8929-8930.

<sup>135</sup> *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Report and Order, 9 FCC Rcd 303 (1993).

<sup>136</sup> Commission rules require that the national average cost per loop be increased by an amount that reduces each carrier's high-cost fund payment in order that the total fund equal the capped amount. See 47 C.F.R. § 36.622 (c) and (d).

<sup>137</sup> Federal universal service support for low-income consumers is available only where eligibility is based solely on income or factors directly related to income. 47 C.F.R. § 54.409.

<sup>138</sup> 47 C.F.R. § 54.403(a)

amount paid by consumers. . . .<sup>139</sup> Finally, carriers can receive federal matching funds of fifty percent of the amount of state Lifeline support, up to a maximum of an additional \$1.75 per month, as long as the entire amount is passed on to subscribers.<sup>140</sup> Federal Lifeline support per qualifying low-income consumer is capped at \$7.00 per month.<sup>141</sup>

### *1. State Commission Approval*

69. The Commission has received petitions for waiver of our Lifeline rules to allow carriers not subject to the jurisdiction of a state commission to receive the second tier of federal support where no regulations issued by local authorities (including state commissions and tribal authorities) exist that would prevent an equivalent reduction in the monthly telephone bills of qualifying low-income consumers.<sup>142</sup> In drafting our rule, we did not consider the situation faced by carriers not subject to the jurisdiction of a state commission. Based on these waiver petitions, it appears that our rule has given rise to certain situations that we did not anticipate. The requirement of state consent prior to making available the second tier of federal Lifeline support was intended to reflect deference to the states in such areas of traditional state expertise and authority.<sup>143</sup> We did not intend to require carriers not subject to state commission jurisdiction to seek either state commission action or a Commission waiver in order to receive the additional \$1.75 available under federal support mechanisms, where that additional support would be passed through to consumers. For these reasons, we propose to modify our rule to state that an additional \$1.75 per qualifying low-income consumer will be provided to the carrier where the additional support will result in an equivalent reduction in the monthly bill of each qualifying low-income consumer. This proposed revision maintains deference to the state commission because the additional support will not be provided where a state commission with jurisdiction to do so has not permitted an equivalent reduction in the consumer's bill. The proposed revision is intended to eliminate the need for carriers not subject to the jurisdiction of a state commission to seek state commission action or a Commission waiver. We seek comment on the proposed revision.

### *2. Federal Support on Tribal Lands*

70. In addition, in keeping with principles of tribal sovereignty, we seek comment on modifying our rule to provide that the third tier of federal support, a maximum of \$1.75 per month per low-income consumer, is available to customers on tribal lands. As described above, the federal government has a special trust relationship with Indian tribes, and this entails special responsibilities, particularly where tribal reservations appear to be particularly disadvantaged by a lack of important resources, like telecommunications.<sup>144</sup> With respect to tribal lands, we seek

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<sup>139</sup> 47 C.F.R. § 54.403(a)

<sup>140</sup> 47 C.F.R. § 54.403(a)

<sup>141</sup> 47 C.F.R. § 54.403(a)

<sup>142</sup> See Petitions for Waiver of Section 54.403(a) filed by Gila River Telecommunications, Inc. (January 22, 1999), Tohono O'odham Utility Authority (January 26, 1999), San Carlos Telecommunications, Inc. (February 12, 1999) and Fort Mojave Telecommunications, Inc. (February 17, 1999).

<sup>143</sup> *First Report and Order* 12 FCC Rcd at 8963.

<sup>144</sup> See *supra* note 76.

comment on the extent to which states currently provide the support necessary to qualify for matching funds for the third tier of Lifeline support.<sup>145</sup> We also seek comment on whether the federal government, in light of its trust relationship with Indian tribes, should provide carriers serving tribal lands the third tier of Lifeline support, \$1.75 per qualifying Lifeline customer, as long as all such Lifeline customers receive an equivalent reduction in their bills. Unlike in other areas, this federal support amount would not be contingent upon the state in which the tribal lands are located providing support.

### 3. *Amendments to Consumer Qualification Criteria*

71. We seek comment on whether the Commission should expand the consumer qualifications for Lifeline assistance to ensure that low income consumers on tribal lands are able to participate fully in the Lifeline assistance program. Under our current rules, in states that provide intrastate matching funds, a consumer must meet the criteria established by the state commission to receive federal Lifeline support.<sup>146</sup> In most states, a consumer can meet the criteria by demonstrating or certifying that he or she participates in one of several narrowly targeted low income assistance programs.<sup>147</sup> We are concerned that some state commissions have established Lifeline criteria that may inadvertently exclude low income consumers on tribal lands because the criteria do not include low income assistance programs that are specifically targeted toward Indians living on tribal lands.<sup>148</sup> Similarly, in those states that do not provide intrastate matching funds (and thus do not establish the consumer qualifications for Lifeline participation), a consumer seeking Lifeline support must certify his or her participation in one of the following Commission-designated low income assistance programs: Medicaid; food stamps; Supplemental Security Income; federal public housing assistance; or Low-Income Home Energy Assistance Program.<sup>149</sup>

72. We seek comment on how the Commission might expand the consumer qualifications for Lifeline support to enable low income consumers on tribal lands to participate in the Lifeline assistance program. In particular, we seek comment about whether we should amend our rules to allow low income consumers on tribal lands to qualify for Lifeline support by certifying their participation in additional means tested assistance programs, such as the programs administered by the Bureau of Indian Affairs<sup>150</sup> or Indian Health Services.<sup>151</sup> We encourage commenters to

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<sup>145</sup> See *Monitoring Report*, June 1999, CC Docket No. 98-202, (rel. Jul. 12, 1999). Section 2, Low-Income Support, contained information about the Lifeline and Link Up support mechanisms. Table 2.1 Lifeline Monthly Support by State or Jurisdiction provides information about the amount of support in each state's programs. See also National Exchange Carrier Association, *Federal Universal Service Programs Fund Size Projections & Contribution Base for the Third Quarter 1999*, appendix 5. (filed April 30, 1999).

<sup>146</sup> 47 C.F.R. § 54.409(a).

<sup>147</sup> See *Universal Service Order*, 12 FCC Rcd at 8973.

<sup>148</sup> See, e.g., *Overcoming Obstacles Proceeding*, Comments of Larry Wetsit, Nemont Telephone Cooperative, Inc.; *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Jerome Block, Commissioner, New Mexico Public Regulation Commission, at p. 136.

<sup>149</sup> 47 C.F.R. § 54.409(b).

<sup>150</sup> See, e.g., 25 C.F.R. § 20.1 *et seq.*

indicate whether there might be other suitable criteria -- based solely on income or factors related to income -- that should be used to determine qualification for low income members of tribal lands. We ask commenters to indicate whether providing Indians living on tribal lands with greater access to Lifeline assistance might increase incentives for eligible telecommunications carriers to serve these tribal lands. Finally, we seek comment on whether the Commission could apply any new criteria specifically targeted to low income Indians living on tribal lands both to states that do not provide matching funds and states that do provide such funds.

#### **IV. DESIGNATING ELIGIBLE TELECOMMUNICATIONS CARRIERS PURSUANT TO SECTION 214(e)(6)**

73. Pursuant to section 254(e) of the 1996 Act, not all telecommunications providers are eligible for federal universal service support. For purposes of the universal service support mechanisms for high-cost areas and low income consumers "only an eligible telecommunications carrier designated under section 214(e) shall be eligible" to receive federal universal service support.<sup>152</sup> To be designated as an eligible telecommunications carrier, a carrier must:<sup>153</sup>

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

74. Under section 214(e), the primary responsibility for designating a prospective carrier as an eligible telecommunications carrier lies with the state commission.<sup>154</sup> In a situation where there is no common carrier willing to provide supported services to an unserved community that requests such services, section 214(e)(3) states that:<sup>155</sup>

[T]he Commission, with respect to interstate services . . . or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.

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<sup>151</sup> See 42 U.S.C. 2002. See also *Overcoming Obstacles Proceeding*, Comments of Nemont Telephone Cooperative at p. 2 (Indians utilize the services of the Indian Health Services ... which is an entitlement and not health insurance).

<sup>152</sup> 47 U.S.C. § 254(e).

<sup>153</sup> 47 U.S.C. § 214(e)(1).

<sup>154</sup> 47 U.S.C. § 214(e)(2) ("A State Commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State Commission.")

<sup>155</sup> 47 U.S.C. § 214(e)(3).

In the event that a common carrier is not subject to the jurisdiction of a state commission, section 214(e)(6) authorizes the Commission, upon request, to designate the carrier as an eligible telecommunications carrier, for a service area designated by the Commission, if the carrier meets the qualifications for eligible telecommunications carrier status.<sup>156</sup>

75. Section 214(e) of the Act states that only an “eligible telecommunications carrier” designated under section 214(e) shall be eligible to receive federal universal service support.<sup>157</sup> Pursuant to section 214(e)(2) and (e)(5) of the Act, state commissions are generally responsible for designating eligible telecommunications carriers and for designating service areas for such carriers.<sup>158</sup> Initially, section 214(e) did not include a provision for designating carriers not subject to the jurisdiction of a state commission. The Act was amended in 1997 to address this “oversight.”<sup>159</sup> Section 214(e)(6) authorizes the Commission to designate as an eligible telecommunications carrier “a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission.” We tentatively conclude that, by adding section 214(e)(6), Congress sought to ensure that carriers serving all regions of the United States have access to a mechanism that will allow them to be designated as eligible telecommunications carriers, if they meet the statutory requirements. Recognizing that the designation of eligible telecommunications carriers is primarily a state commission function, Congress granted this Commission the authority for this task in the event that a carrier is not subject to the jurisdiction of a state commission.<sup>160</sup>

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<sup>156</sup> 47 U.S.C. § 214(e)(6).

<sup>157</sup> 47 U.S.C. § 214(e).

<sup>158</sup> 47 USC §§ 214(e)(2) and (e)(5).

<sup>159</sup> Statement of Senator McCain, 143 Cong. Rec. S115545-04, S115546 (Oct. 31, 1997).

<sup>160</sup> See Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, FCC 97-419 (rel. Dec. 29, 1997). Until recently, carriers seeking eligible telecommunications carrier designation from the Commission have been tribally owned or tribal cooperatives. See *Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O’odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, AAD/USB File No. 98028, DA 98-392, (rel. Feb. 27, 1998); *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 98-2237 (rel. Nov. 4, 1998); *Cheyenne River Sioux Tribe Telephone Authority Seeks FCC Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, AAD/USB File No. 98-21, DA 98-150 (rel. Jan. 28, 1998).

On June 2, 1999, however, we received a petition from a carrier that is not affiliated with a tribe to serve a tribal area. *Petition of Smith Bagley, Inc., for Designation as an Eligible Telecommunications Carrier: Pleading Cycle Established*, Public Notice, DA 99-1331 (rel. Jul. 7, 1999). We do not intend to delay this application pending the adoption of final rules in this proceeding. We will consult with the tribal authorities and relevant state commission prior to making a designation on how best to consider any input we may receive. The example is merely illustrative of the challenges we face in coordinating our federal universal service policies with tribal interests.



76. Although some of the legislative history of section 214(e)(6) focuses on the ability of tribally-owned carriers to be designated as eligible telecommunications carriers,<sup>161</sup> the statutory language and other legislative history is not so limited. The other legislative history states that “the intent of this bill is to cover such situations where a State commission lacks jurisdiction over a carrier, in which case the FCC determines who is eligible to receive federal universal service support.”<sup>162</sup> The legislative history also makes clear that “nothing in this bill is intended to impact litigation regarding jurisdiction between State and federally recognized tribal entities” or to “expand or restrict the existing jurisdiction of State commissions over any common carrier or provider in any particular situation.”<sup>163</sup> In the following paragraphs, we seek comment on how section 214(e)(6) should be interpreted and implemented with respect to carriers (whether tribally owned or otherwise) that provide telecommunications services to tribal areas.

77. First, however, we seek comment identifying other situations in which carriers providing telephone exchange and exchange access services to areas other than tribal lands are not subject to state commission jurisdiction and thus must seek designation as eligible telecommunications carriers from the Commission. In this context, we seek comment on whether the Commission, rather than state commissions, has the jurisdiction to designate terrestrial wireless or satellite carriers as eligible telecommunications carriers. If such carriers submit applications for designation pursuant to section 214(e)(6) during the pendency of this proceeding, we will consider them on a case by case basis in light of the statutory language and the showings made by the affected parties. We also note that our analysis of the scope of the designation provision of section 214(e)(6) is not intended to affect any other decision with respect to the authority of state commissions or tribal authorities to regulate telecommunications on tribal lands or over terrestrial wireless or satellite carriers.

78. The statutory language of section 214(e)(6) is ambiguous with respect to when the Commission’s authority to designate eligible telecommunications carriers is triggered. It is not clear whether the Commission’s authority is triggered when a carrier is not subject to the jurisdiction of a state commission or when the service or access the carrier provides is not subject to the jurisdiction of a state commission. Thus, the initial question in interpreting section 214(e)(6) with respect to the provision of telecommunications service in tribal lands is under what circumstances the Commission may designate carriers as eligible telecommunications carriers. The title of section 214(e)(6), “Common Carriers not Subject to State Commission Jurisdiction,” suggests that the triggering inquiry is whether the carrier is subject to state commission jurisdiction. We tentatively conclude, however, that the better interpretation of section 214(e)(6) is that the determination of whether a carrier is subject to the jurisdiction of a

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<sup>161</sup> See, e.g., Statement of Senator McCain, 143 Cong. Rec. S115545-04, 115546 (Oct. 31, 1997) (“[t]ypically, States also have no jurisdiction over tribally owned companies which may or may not be regulated by a tribal authority that is not a State commission per se.”); Statement of Representative Bliley, 143 Cong. Rec. H10807-02 (Nov. 13, 1997) (“some common carriers providing service today are not subject to the jurisdiction of a State commission; most notably, some carriers owned or controlled by native Americans”); Statement of Representative Markey, 143 Cong. Rec. H10807-02, H10808 (Nov. 13, 1997) (“[t]he bill before us today allows a common carrier that is not subject to the jurisdiction of a State commission, including those telephone companies owned by certain federally-recognized Indian tribes, to be designated. . .”).

<sup>162</sup> Statement of Representative Bliley, 143 Cong. Rec. H10807-02, H10809 (Nov. 13, 1997).

<sup>163</sup> See Colloquy between Representatives Thune and Bliley, 143 Cong. Rec. H10807-02, H10809 (Nov. 13, 1997).

state commission depends in turn on the nature of the service provided (e.g. telephone exchange or access service provided by wire, satellite or terrestrial wireless) or the geographic area in which the service is being provided (e.g. tribal lands). This interpretation is supported by the legislative history of section 214(e)(6). Representative Tauzin stated that "S.1354 makes a technical correction to the Act that will make it possible for telephone companies serving *areas* not subject to the jurisdiction of a State Commission, to be eligible to receive federal Universal Service support."<sup>164</sup> Our tentative conclusion that the nature of the service or the geographic area in which the carrier provides it should be the basis for distinguishing between the designation authority of the Commission and state commission under section 214(e)(6), is consistent with other provisions of the Act. Section 2 of the Act similarly distinguishes between federal and state jurisdiction over telecommunications services based on the geographic area in which the service is provided. Section 332(3) of the Act limits state authority on the basis of the service provided (i.e. commercial and private mobile service). We seek comment on this analysis and on any other factors which may be relevant to this determination.

79. Our next question then is under what circumstances are telecommunications carriers providing telecommunications services on tribal lands subject to state commission authority? In section III.A.2, above, we seek comment on the extent to which a state commission has jurisdiction over tribally-owned carriers seeking to provide telecommunications service on tribal lands and over non-tribally-owned carriers seeking to provide such service on tribal lands. The answer to these questions will determine whether the Commission may designate carriers seeking to provide service on tribal lands as eligible telecommunications carriers. With respect to tribally-owned carriers seeking to provide telecommunications service on tribal lands, we note that state law is generally inapplicable when states attempt to regulate the conduct of tribal members directly within reservation boundaries,<sup>165</sup> except in "exceptional circumstances."<sup>166</sup> We seek comment on whether, for the purpose of eligible telecommunications carrier designation, tribally-owned carriers providing telecommunications services within tribal reservations would be subject to state regulatory authority.

80. We further recognize that when states seek to regulate non-tribal members and their activities conducted within a reservation, the appropriateness of the state's assertion of regulatory authority is determined by a "particularized inquiry" into the nature of the state, federal, and tribal interests at stake. Specifically, the analysis turns "on whether state authority is pre-empted by the operation of federal law; and '[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."<sup>167</sup> We recognize that this inquiry is a particularized one, and thus specific to each

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<sup>164</sup> Statement of Representative Tauzin, 143 Cong. Rec. H10807-02, H10809 (Nov. 13, 1997) (emphasis added). See also Statement of Representative Bliley at H10809.

<sup>165</sup> See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980); *New Mexico v. Mesclero Apache Tribe*, 462 U.S. 324, 331-332.

<sup>166</sup> *New Mexico v. Mesclero Apache Tribe*, 462 U.S. at 331-32.

<sup>167</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 quoting *New Mexico v. Mesclero Apache Tribe*, 462 U.S. 324, 334-5 (1983) (internal citations omitted).

state and the facts and circumstances surrounding the provision of telecommunications services by non-tribal members within those tribal lands. However, we seek comment on whether there are any general federal, state and tribal interests at stake which might inform the inquiry and help provide general guidance on the proper boundaries of state authority in this case. Specifically, we seek comment on the federal government's interest in assuming authority over the designation of eligible telecommunications services, and the extent to which state authority would be preempted by the operation of federal law -- namely section 214 or other relevant provisions or other federal or tribal interests reflected in federal law.

81. We also seek comment on the states' interests in designating eligible telecommunications carriers, as well as the implications of state designation on Indian sovereignty, self-government and "tribal self-sufficiency and economic development."<sup>168</sup> We recognize, however, that some state commissions have asserted jurisdiction over carriers seeking to provide service on tribal lands, and that these commissions regulate certain aspects of a carrier's provisions of service on tribal lands.<sup>169</sup>

82. In implementing section 214(e)(6), we are concerned that the fact intensiveness and the legal complexity of determining whether a state has jurisdiction over carriers seeking designation as an eligible telecommunications carrier may lead to confusion, duplication of efforts and needless controversy among carriers, tribal authorities, state commissions and this Commission, which could undermine efforts to achieve our universal service goals. For these reasons, we propose the following process to treat applications for the Commission's designation of eligible telecommunications companies eligible to receive universal service support for serving tribal land. Carriers seeking designation as an eligible telecommunications carrier from this Commission, whether to serve tribal lands or on the basis of other jurisdictional arguments,<sup>170</sup> should consult with the relevant tribal authority, where appropriate, and the state commission on the issue of whether the state commission has jurisdiction to designate the carrier. In situations where the tribal authority and the state commission agree that the state has jurisdiction, we anticipate that the state would conduct the designation proceeding. In instances where the tribal authority challenges the state's exercise of jurisdiction, we encourage the carriers, with the support of the tribal authority, to apply to this Commission for designation. In the public comment period subsequent to a carrier's application for designation as an eligible telecommunications carrier, the carriers and tribal authorities would be expected to demonstrate

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<sup>168</sup> *Calbazon Band of Mission Indians*, 480 U.S. at 216.

<sup>169</sup> See, e.g. *The Cheyenne River Sioux Tribe Telephone Authority and U S West Communications, Inc.*, Joint Petition for Preemption Pursuant to section 253, CC Docket No. 98-6 (Jan. 22, 1998); *Cheyenne River Sioux Tribe Telephone Authority and U S West v. PUC of South Dakota*, 1999 WL 314108 (S.D. May 19, 1999) (affirming South Dakota PUC's decision to deny U S West's proposed sale of three exchanges to the Cheyenne River Sioux Tribe Telephone Authority.) In section III.A, we seek comment on the nature and extent of state and tribal regulation of telecommunications services provided by tribal carriers on tribal lands. We also seek comment on the extent to which, and on what basis, states have previously designated tribal and non-tribal carriers as eligible telecommunications carriers eligible to receive universal service support.

<sup>170</sup> See, e.g., *Petition of Smith Bagley, Inc., for Designation as an Eligible Telecommunications Carrier: Pleading Cycle Established*, Public Notice, DA 99-1331 (rel. Jul. 7, 1999). See 47 U.S.C. § 332 ("no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services . . .").

why Commission designation is appropriate. Interested parties, including the state commission, that disagree with the Commission's exercise of jurisdiction would also be expected to raise their challenges in that proceeding. We seek comment on this proposal and suggestions for other ways in which the determination of whether the designation must be performed by the Commission or a state commission could be simplified or streamlined.

## V. UNSERVED AREAS -- IMPLEMENTATION OF SECTION 214(e)(3)

### A. Overview

83. The federal universal service support mechanisms are designed to provide appropriate incentives for the deployment of facilities capable of providing the supported services and the promotion of increased subscribership. This system depends upon the complex interrelationship between federal mechanisms and state actions. For these reasons, we rely on the input of the Joint Board in making our decisions. In general, we are confident that the new forward-looking high-cost support mechanism described in the *Thirteenth Order on Reconsideration* will provide appropriate incentives for carriers to provide supported services to all Americans who need them. Nonetheless, we are concerned that certain areas of the nation remain unserved because of extraordinarily high-costs, low-incomes, or any other factors identified above in section II.C above, that would inhibit service. In this section, we discuss a specific statutory provision, section 214(e)(3) of the Act, that may allow the Commission to accelerate the deployment of facilities and the provision of service in unserved areas by ordering carriers to serve those areas.

84. Section 214(e)(3) of the Act establishes that, in certain instances, the Commission or state commissions may order a common carrier to provide the services supported by universal service in unserved areas. Due to the lack of information in the record, and at the Joint Board's recommendation, the Commission decided in the May 8, 1997 *First Report and Order* not to adopt particular rules to implement this provision at that time.<sup>171</sup> As part of our current efforts to promote the deployment of service in unserved areas, insular and tribal lands, we conclude that it is time to establish a framework for conducting proceedings pursuant to section 214(e)(3). Accordingly, we seek comment, as described below, regarding the implementation of this provision.

85. Section 214(e)(3) provides that:

if no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph

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<sup>171</sup> *First Report and Order*, 12 FCC Rcd at 8885-8886. The Commission encouraged state commissions to file with the Common Carrier Bureau reports detailing the status of unserved areas in their states. See, e.g., Letter from Diane Wells, Minnesota Public Utilities Commission, to Valerie Yates, FCC (dated June 18, 1999) (enclosing information regarding a petition that the Minnesota Public Utilities Commission is currently processing concerning "unassigned territory" in Minnesota). See also *First Recommended Decision*, 12 FCC Rcd at 184.

(6) applies,<sup>172</sup> or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

The legislative history for this provision states that section 214(e)(3) "makes explicit the implicit authority of the Commission" to order a common carrier to provide services supported by the universal service support mechanisms.<sup>173</sup>

### B. Defining "Unserved Area"

86. In order to determine whether an allegedly unserved community is eligible for relief pursuant to section 214(e)(3),<sup>174</sup> we must first decide whether the area at issue is unserved. Only after making this initial determination can we proceed with the rest of the analysis required by section 214(e)(3). We propose defining an unserved area as "any area in which facilities would need to be deployed in order for its residents to receive each of the services designated for support by the universal service support mechanisms." In the *First Report and Order*, we identified the services that would be supported by universal service support mechanisms as: single-party service; voice grade access to the public switched network; DTMF signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation services for qualifying low-income consumers.<sup>175</sup> These services were identified based on the statutory directive embodied in section 254(c)(1)(A)-(D), requiring the Joint Board and the Commission to "consider the extent to which ... telecommunications services" included in the definition of universal service: (1) are essential to education, public health, or public safety; (2) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (3) are being deployed in public telecommunications networks by telecommunications carriers; and (4) are consistent with the public interest, convenience and necessity.<sup>176</sup>

87. The proposed definition is based on whether facilities would need to be deployed to provide the supported services to distinguish unserved areas from areas in which a large percentage of the population does not subscribe to available services. This definition is intended to help further our statutory mandate to promote the availability of services supported by federal

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<sup>172</sup> See 47 U.S.C. § 214(e)(6) (authorizing the Commission to designate a common carrier that is not subject to the jurisdiction of a state commission as an eligible telecommunications carrier). See also discussion at section IV, above.

<sup>173</sup> S. Rep. No. 230, 104th Cong., 2d Sess. 131, at 141 (1996) (Joint Explanatory Statement).

<sup>174</sup> 47 U.S.C. § 214(e)(3).

<sup>175</sup> *First Report and Order*, 12 FCC Rcd. at 8809.

<sup>176</sup> 47 U.S.C. § 254(c)(1)(A)-(D).

universal service support mechanisms.<sup>177</sup> We recognize that this definition may result in certain areas being deemed unserved, even though those areas are receiving some level of service that includes less than all of the services designated for support by the universal service support mechanisms. We also recognize that this definition may result in the existence of relatively small unserved areas within larger areas that are currently receiving service. We seek comment on whether this definition will enable us to appropriately target our efforts to those areas that do not receive all of the services supported by federal universal service support mechanisms.

88. We emphasize, however, that determining whether a particular area meets the definition of unserved area is only the beginning of the analysis under section 214(e)(3). To obtain relief pursuant to section 214(e)(3), each of the steps discussed below must be followed. We seek comment on this analysis and we invite commenters to propose alternative definitions.

### **C. Determining When a Community is Unserved**

89. The language “or any portion thereof” in section 214(e)(3) suggests that we are not meant to impose minimum size requirements on the number of potential subscribers needed to invoke the authority of section 214(e)(3). We seek comment on whether the language should be interpreted differently or suggests a particular definition.

### **D. Determining When No Common Carrier Will Provide Service**

90. By its terms, the relief afforded in section 214(e)(3) is not triggered until a determination is made that “no common carrier will provide” the services supported by the federal universal service support mechanisms. Therefore, we seek comment on the meaning of the phrase “no common carrier will provide” the supported services.

91. As an initial matter, section 214(e)(3) does not specify whether the request for service must be received from members of the unserved community or whether state, local, or tribal authorities must make an official request for service from the carrier on behalf of the unserved members of the community. We tentatively conclude that limitations on who may issue the request are not warranted by the terms of the statute or the goals it seeks to achieve. We seek comment on this tentative conclusion.

92. We tentatively conclude that the language “no common carrier will provide” the services supported by the federal universal service support mechanisms means something more than no common carrier is actually providing the supported services. We seek comment on how we can determine that no common carrier is willing to provide the supported services. We seek comment on which common carriers must be asked in order to reach the conclusion that no common carrier will provide the service. We seek comment on how a satellite services provider should be treated for this issue, given that they can potentially provide service to these unserved areas. We also seek comment on whether the reasons for the common carrier’s refusal to provide service are relevant to a determination that the area is unserved. For example, what if the refusal to provide service is based on the poor credit histories of the individuals requesting service or an existing overdue debt? Given the extremely low annual incomes, on average, on

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<sup>177</sup> 47 U.S.C. §254.

tribal lands, it seems possible that inadequate credit histories of the potential customers may cause a carrier to be unwilling to provide service.

#### **E. Identifying Carrier or Carriers Best Able to Serve Unserved Areas**

93. Section 214(e)(3) authorizes the Commission, with respect to interstate service or an areas served by a carrier to which section 214(e)(6) applies, and state commissions, with respect to intrastate service, to determine which carrier or carriers are best able to provide service to the requesting, unserved community and order that carrier or carriers to provide service. We seek comment on the relative roles that the Commission and the states should play in determining which carriers are best able to provide the supported services in unserved areas, including any coordination that should occur in making this determination.

94. We seek comment on whether the Commission is authorized to and whether it should establish national guidelines by which states may or must make this determination, when they have jurisdiction to do so. We recognize that the selection of the carrier to serve some unserved areas pursuant to section (e)(3) of the Act is to be made by state commissions. We seek comment on whether a consistent, national approach is necessary to further the universal service goals of the Act or to provide certainty to carriers regarding the possible application of this important provision. We seek comment on whether, in situations where the state has jurisdiction to designate eligible telecommunications carriers, all aspects of this decision should be left to the states because states have more familiarity with the areas in question. We also seek comment on the role of tribal authorities with respect to the Commission's determination of the carrier or carriers best able to serve unserved, tribal lands. We also seek comment to determine whether the Commission's obligation to identify and order a carrier to provide service in tribal lands should be affected by the interests of the tribal authorities.

95. One approach for making a determination pursuant to section 214(e)(3) would be to conduct a fact-intensive inquiry, polling common carriers serving nearby or surrounding areas to determine where existing facilities are deployed, to estimate the costs for each carrier to provide the supported services, and to consider other possible factors that may be relevant to the conclusion that a carrier is "best able." We tentatively conclude, however, that our preferred approach would be to adopt a competitive bidding mechanism for identifying the carrier or carriers best able to provide service in unserved areas for which the Commission has authority to order carriers to provide service. We seek comment on the use of a competitive bidding mechanism in section V.E.2, below. We seek comment on whether it is within our authority to require states to adopt a competitive bidding mechanism to determine which carrier or carriers will be ordered to provide intrastate service in unserved areas to which section 214(e)(6) does not apply.

96. If the competitive bidding mechanism does not give rise to a carrier willing and able to provide the supported services in the unserved area at a reasonable cost, we seek comment on whether the Commission should then initiate an inquiry to determine the carrier or carriers best-able to provide service to the area. We seek comment on whether the following factors would be relevant in making that determination: (1) whether the area falls within the designated service area of an existing carrier; (2) the extent to which a carrier has deployed facilities capable of providing supported services in the surrounding area; (3) the cost for that carrier to build facilities capable of providing the supported services; (4) the quality of services that would be

provided; (5) the financial strength of the carrier; (6) the proportionate impact serving the area would have on the number of lines and the geographic area served by the carrier; (7) the amount of time required for the carrier to deploy facilities; and (8) a carrier's status as either an incumbent LEC or a competitive eligible telecommunications carrier. We seek comment on any other factors that may be relevant. We also seek comment on whether our inquiry must be limited to incumbent LECs and competitive eligible telecommunications carriers or whether we may also include other competitive LECs, interexchange carriers, terrestrial wireless or satellite service providers, or providers of cable or electric services that would be capable of providing the supported services to the unserved area. We seek comment on whether to exclude certain carriers from consideration, for example, carriers that are considered small entities for purposes of the Regulatory Flexibility Act.<sup>178</sup> Finally, we seek comment on whether the preferences of the unserved community for a particular carrier or technology should be considered in making a determination of which carrier is best able to provide service to the area.

### ***1. Background on Competitive Bidding***

97. In the Notice of Proposed Rulemaking issued to implement the universal service provisions of the 1996 Act,<sup>179</sup> the Commission sought comment on how to provide universal service support to rural, insular, and high-cost areas, generally,<sup>180</sup> and asked whether competitive bidding could be used to set the level of support.<sup>181</sup> The Commission sought comment on the use of a competitive bidding system in which eligible carriers offering all of the services supported by universal service mechanisms would bid on the level of assistance per line that they would need to provide such services at affordable rates, consistent with the Act. The Commission explained that such an approach would attempt to harness competitive forces to minimize the cost of universal service. In a July 1996 Public Notice, the Common Carrier Bureau sought further comment on a competitive bidding system.<sup>182</sup> In addition, Commission staff conducted *ex parte* meetings relating to competitive bidding, including a March 19, 1997 forum on universal service auctions.<sup>183</sup>

98. The Joint Board focused its recommendations regarding support for rural, insular, and high-cost areas on a mechanism for estimating the forward-looking economic cost of service for such areas. The Joint Board concluded that:

[w]hile the record in this proceeding persuades us that a properly structured competitive bidding system could have significant

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<sup>178</sup> 5 U.S.C. § 601 *et. seq.*, amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). See section VIII.C for the Initial Regulatory Flexibility Act Analysis.

<sup>179</sup> Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking and Order Establishing a Joint Board*, CC Docket No. 96-45, 11 FCC Rcd 18092 (1996) (*May 1996 Notice*).

<sup>180</sup> *May 1996 Notice*, 11 FCC Rcd at 18101-18116.

<sup>181</sup> *May 1996 Notice*, 11 FCC Rcd at 18111.

<sup>182</sup> Public Notice, Common Carrier Bureau Seeks Further Comment on Specific Questions in Universal Service Notice of Proposed Rulemaking, DA 96-1078 (rel. July 3, 1996) (*Further Comment Public Notice*).

<sup>183</sup> We also note that the California Public Utilities Commission conducted a workshop on May 8-9, 1997, to develop auction mechanism rules for the California High-cost fund.



advantages over other mechanisms used to determine the level of universal service support for high cost areas, we find that the information contained in the record does not support adoption of any particular competitive bidding proposal at this time.<sup>184</sup>

99. The Joint Board cited the potential advantages of competitive bidding including the use of marketplace dynamics to establish the level of universal service support for any given area.<sup>185</sup> The Joint Board noted that "[a] properly designed competitive bidding system would reduce the role of regulators in determining the costs of providing universal service once an area becomes subject to bidding."<sup>186</sup> The Joint Board also recognized that a properly structured competitive bidding system could reduce the amount of support needed for universal service by reflecting the lower costs of more efficient carriers and new technologies that would be used to set the level of universal service support for the entire area.<sup>187</sup>

100. The Joint Board found that sections 254 and 214(e) of the Act<sup>188</sup> and the record developed in this proceeding provide some guidance as to how a competitive bidding system should be structured.<sup>189</sup> The Joint Board recommended that any carrier that meets the eligibility criteria for universal service support should be permitted to participate in the auction and that any competitive bidding system should be competitively neutral, favoring neither incumbents nor new entrants.<sup>190</sup> It also recommended that the system adopted should minimize the ability of bidders to collude,<sup>191</sup> and suggested that the system should either prescribe a minimum number of bidders or be designed to be effective for any number of bidders.<sup>192</sup> Finally, the Joint Board recommended that, in determining the geographic area that carriers would bid to serve, any final proposed bidding plan use areas sized to promote competition and target universal service support efficiently.<sup>193</sup>

101. On May 8, 1997, the Commission released its *First Report and Order*. In the *First Report and Order*, the Commission adopted most of the recommendations of the Joint Board including "a specific timetable for implementation of federal universal service support to rural, insular, and high cost areas."<sup>194</sup> In the *First Report and Order*, the Commission found that "a compelling reason to use competitive bidding is its potential as a market-based approach to determining universal service support. . . ."<sup>195</sup> The Commission also found that "a properly

<sup>184</sup> *First Recommended Decision*, 12 FCC Rcd at 265.

<sup>185</sup> *First Recommended Decision*, 12 FCC Rcd at 266.

<sup>186</sup> *First Recommended Decision*, 12 FCC Rcd at 266.

<sup>187</sup> *First Recommended Decision*, 12 FCC Rcd at 266.

<sup>188</sup> 47 U.S.C. §§ 214(e), 254

<sup>189</sup> *First Recommended Decision*, 12 FCC Rcd at 267.

<sup>190</sup> *First Recommended Decision*, 12 FCC Rcd at 267.

<sup>191</sup> *First Recommended Decision*, 12 FCC Rcd at 267.

<sup>192</sup> *First Recommended Decision*, 12 FCC Rcd at 268.

<sup>193</sup> *First Recommended Decision*, 12 FCC Rcd at 268.

<sup>194</sup> *First Report and Order*, 12 FCC Rcd at 8888.

<sup>195</sup> *First Report and Order*, 12 FCC Rcd at 8948.

structured competitive bidding system would . . . reduce the amount of support needed for universal service."<sup>196</sup> By reducing the amount of support provided for universal service, the Commission found that competitive bidding may advance the goal of affordable rates because carriers would be able to pass-through any reductions to their subscribers. The Commission concluded, however, that further proceedings were needed to examine issues related to the use of competitive bidding to set universal service support levels for rural, insular, and high-cost areas.<sup>197</sup> Specifically, the Commission found that the record did not contain adequate discussion or analysis to enable us either to define a competitive bidding mechanism that would be consistent with the requirements of sections 214(e) and 254, or to adopt specific procedures for implementing a lawful competitive bidding system.<sup>198</sup>

## ***2. Competitive Bidding Proposal***

102. We tentatively conclude that we should adopt a competitive bidding mechanism to identify the carrier or carriers best able to provide the supported services in unserved tribal lands and to set the level of support provided for serving the area. We are hopeful that we may be able to design a competitive bidding mechanism that will generate public awareness of the needs of a particular area for service and elicit proposals from one or more carriers that could be compared before determining which carrier or carriers should be designated as an eligible telecommunications carrier for the area. We seek comment on this proposal.

103. We seek comment on whether the possibility that a carrier will be ordered to provide service pursuant to section 214(e)(3) will provide incentives for carriers to participate in the competitive bidding mechanism in order to be able to set the terms on which they will provide service. We seek comment on whether the competitive bidding mechanism could bring unserved areas to the attention of carriers previously unaware of the need for telecommunications services in those areas and thus identify carriers that would be willing to provide service to the area for a support amount equal to or lower than the amount that would be provided under existing federal universal service support mechanisms. In addition, we seek comment on possible negative incentives and distortions that may be created by using a competitive bidding mechanism. For example, we seek comment on whether a competitive bidding approach will likely lead carriers to provide the lowest-cost, lowest-quality service that meets the definition of supported services, unfairly depriving residents of higher quality or advanced services.

104. We also seek comment on whether the Commission should conduct a trial to determine whether a competitive bidding mechanism is the most efficient means of identifying the carrier or carriers best able to provide the supported services in unserved areas. We seek comment on how large a service area would be appropriate for such a trial. We seek comment on whether the Commission should solicit volunteers from Indian tribes that currently have large unserved areas.

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<sup>196</sup> *First Report and Order*, 12 FCC Rcd at 8948.

<sup>197</sup> *First Report and Order*, 12 FCC Rcd at 8951.

<sup>198</sup> *First Report and Order*, 12 FCC Rcd at 8949-8951.

**(a) Participants**

105. We seek comment on the possible participants in a competitive bidding proceeding. Section 214(e)(3) states that any carrier ordered to provide service pursuant to this section shall meet the requirements necessary and be designated an eligible telecommunications carrier for the unserved area.<sup>199</sup> We seek comment on whether a carrier must first be designated an eligible telecommunications carrier for the area prior to participating in the competitive bidding mechanism. We seek comment on whether any carrier that can demonstrate that it can meet the requirements of section 214(e)(1) may participate in the competitive bidding mechanism. We seek comment on what kind of showing is necessary to demonstrate that a carrier can meet the requirements of section 214(e)(1). We seek comment on whether terrestrial wireless or satellite providers will be able to participate in the competitive bidding mechanism. We also seek comment on the number of bidders we should anticipate for auctions in the universal service context, and the extent to which we should consider that number in deciding the type of auction that should be used, as discussed below.

**(b) Number of Winners**

106. We seek comment on whether the characteristics of the unserved tribal lands may be such that it is not economically practical to support more than one provider to serve unserved, tribal lands. To the extent that supporting a single provider is more economical, permitting multiple providers to receive federal universal service support may not be in the public interest. In addition, if all carriers were entitled to receive support at the level determined in the competitive bidding auctions, bidders would have no incentive to bid below the opening level; that is, competitive bidding would not reveal the minimum amount of support necessary to provide service to the area. For these reasons, we propose that qualified eligible telecommunications carriers bid to secure an exclusive right to receive universal service support for serving the unserved tribal area. That is, the winning bidder would be the only carrier designated as an eligible telecommunications carrier for providing the supported services to the unserved, tribal lands subject to competitive bidding.

107. We seek comment on whether the Commission has the authority to and whether we should try to attract carriers by agreeing to designate only one carrier to serve the unserved, tribal land or permitting only one carrier to receive federal universal service support for serving the area. We seek comment on whether a decision to limit support to a single carrier is consistent with the universal service provisions and pro-competitive goals of the Act. We observe that, in the case of an area served by a rural carrier, the Commission "may" designate more than one eligible telecommunications carrier but must make a specific showing that an additional eligible telecommunications carrier would serve the public interest.<sup>200</sup> With respect to all other carriers, the Commission "shall" designate more than one common carrier as an eligible

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<sup>199</sup> See 47 U.S.C. §214(e)(1). To be designated as an eligible telecommunications carrier, a carrier must: (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and (B) advertise the availability of such services and the charges therefor using media of general distribution.

<sup>200</sup> 47 U.S.C. § 214(e)(6). This discussion is limited to situations where the Commission has authority to designate eligible telecommunications carriers, including tribal lands.

telecommunications carrier. We seek comment on whether these provisions apply with respect to an unserved area. We seek comment on whether the statutory language that the Commission “shall determine which carrier or carriers are best able to provide such service” indicates that the Commission may determine that a single carrier shall be designated. Finally, we seek comment concerning the ability of bidders to accurately estimate the possible future challenges from other carriers for the more profitable customers in the previously unserved, tribal lands.

108. As an alternative to a single winner, we consider the possibility of supporting two or more winning bidders. We generally believe that customers benefit most when multiple providers are available, because competition leads to lower prices and provides an alternative where service quality is unsatisfactory. Supporting two winning bidders means that a second carrier would be able to compete vigorously with the lowest bidder. We seek comment on whether to use the competitive bidding mechanism to identify a level of support which would be provided for serving the area and to allow any carrier with a bid within a specific range of the winning bidder,<sup>201</sup> who also satisfies the requirements of section 214(e)(1) of the Act, to receive that level of support for providing service to the area. We seek comment on whether the possibility of having multiple carriers receive support for these previously unserved areas would substantially diminish or even eliminate any incentives carrier might have to participate in competitive bidding. We seek comment on whether providing support sufficient to allow competing carriers to build the necessary infrastructure would generate customer benefits over the long-term that would offset the additional cost associated with supporting two carriers. In making this determination, we must consider the duration of the service term and the rate of change in network technology. For example, if technological change were so rapid that both the new entrant and incumbent carrier would need to install and recover the cost of new facilities for each contract term, the benefits of creating competing carriers would be significantly reduced. We seek comment on these issues.

### **(c) Term of Exclusivity Period**

109. If the Commission determines that a bidder should win the exclusive right to federal universal service support, we would seek to establish an exclusivity period that is of an adequate length to provide incentives for carriers to deploy facilities yet does not result in unnecessary support being provided. We seek comment on the appropriate duration of any exclusivity period. After the exclusivity period has ended, we could choose to re-auction the service obligation and consider multiple providers if the costs of providing service decreased or market conditions improved so that multiple providers became practical. We anticipate that the length of the exclusivity period will affect the bids for monthly support levels. In addition, the length of the exclusivity period will affect the average administrative and transaction costs for conducting the auction. Granting exclusivity periods that are too short could be harmful because the winning carrier is likely to need time to establish its network, and to amortize its investments. In addition, more frequent auctions entail increased administrative costs. Granting periods that are too long, however, also could be harmful. Technological advances over time can create more efficient means of providing communications, which would enable firms to offer service at a lower cost. To the extent that the winning bidder is shielded from competition during the exclusivity period, the benefits of adopting a more efficient technology will accrue to

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<sup>201</sup> GTE proposes such a plan for multiple winners. See Appendix D.

the carrier, rather than the customer.<sup>202</sup> In addition, with longer contract terms, the carriers' prediction of their costs at later stages in the contract becomes more speculative, which could translate into higher bids in the auction. We seek comment on this analysis and the appropriate length of the exclusivity period. We suggest that commenters review the competitive bidding proposals and mechanisms summarized in Appendix D for examples that may assist in determining the length of the exclusivity requirement.

#### **(d) Bidding Process**

110. We seek comment on whether to use a single-round, sealed bid process or a descending, multi-round auction.<sup>203</sup> Each bidder would submit an amount of support necessary per line given our universal service technical specifications. We observe that the Commission has successfully implemented multi-round auctions in other contexts.<sup>204</sup> We seek comment on whether a descending multi-round bidding system would be preferable to a single-round sealed bid auction.<sup>205</sup>

111. We also seek comment on how to establish the reservation price – the highest bid that would qualify for support – for the competitive bidding mechanism. One option would be to use the new high-cost mechanism to estimate the amount of support that would be available for providing the supported services in the unserved, tribal area and set that as the reservation price. We seek comment on what incentives carriers would have, if any, to bid an amount lower than the reservation price determined by the model. Alternatively, we seek comment on whether we should set a reservation price that is some percentage above the support amount determined under the new high-cost mechanisms. We seek comment on whether a rational percentage can be identified. We also seek comment on whether to conduct an auction without establishing a particular reservation price or specifically identifying the amount that would be provided under the new high-cost mechanism in an effort to determine the amount of support each carrier believes is necessary. We seek comment on whether, if we were to proceed in this manner, the Commission should reserve the right to conclude that the competitive bidding mechanism was not successful and to proceed to the fact-based inquiry, described in paragraph 96 above.

#### **(e) Support Amount**

112. A well-designed auction should provide incentives for carriers to disclose the minimum amount of support they require, even though this information may be competitively sensitive. We seek comment on how to provide incentives for carriers to reveal the minimum amount of support necessary to provide service to the unserved area. We seek comment on whether we should employ a "Second Price" or "Vickrey" auction, in which the successful bidder gets support at the level of the lowest bid made by a non-successful bidder. In theory, this

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<sup>202</sup> Allowing the benefits to accrue to the carrier may actually provide valuable incentives that encourage participation in the auction.

<sup>203</sup> For examples of procurement auctions where the low bid wins, see <http://www.netbidding.com/netbidding/html/netbidding.html> (business-to-business procurement) and <http://www.econ.ag.gov/epubs/pdf/aer766/index.htm> (USDA procurements).

<sup>204</sup> To date, the Commission has conducted 23 multi-round auctions for spectrum licenses in a variety of wireless services. For information on past Commission spectrum auctions, see <http://www.fcc.gov/wtb/auctions>.

<sup>205</sup> See Kelly-Steinberg proposal, summarized in Appendix D.

style of auction appears to induce bidders to reveal their actual costs and would thereby generate the same total support requirements as a first price, sealed bid auction.<sup>206</sup> Another factor relevant in setting the support level is whether the federal support provided constitutes the entire amount of subsidy available to the carrier. We tentatively conclude that we would need to establish that the competitive bidding mechanism for unserved areas would be used to determine the entire amount of support to be divided and the relevant share of support would be allocated to the federal and state authorities, in whatever proportion is established for the high-cost support mechanism in general. We seek comment on this analysis.

### (f) Obligations Assumed by Winning Bidder

113. We tentatively conclude that, pursuant to section 214(e), a successful bidder must provide the services supported by the universal service support mechanisms to all customers requesting service in the designated area and advertise the availability of such service throughout the service area.<sup>207</sup> We seek comment on this tentative conclusion.

### 3. Other Proposals and Examples of Competitive Bidding

114. A number of parties submitted competitive bidding proposals in the universal service docket, the most detailed of which were submitted by GTE,<sup>208</sup> consultants to Ameritech,<sup>209</sup> and Frank Kelly and Richard Steinberg of Cambridge University, Great Britain.<sup>210</sup> These proposals were designed to determine the carrier or carriers entitled to receive universal service support and the level of support to be provided. In addition, other government agencies have used competitive bidding systems that may have features relevant to the market at issue here. We seek comment on these other competitive bidding proposals, summarized in Appendix D, because aspects of these proposals may be preferable to the competitive bidding approach proposed above.

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<sup>206</sup> In a standard, sealed-bid procurement auction, where the successful bidder receives the amount of the bid, a firm typically shades its bid by not revealing the minimum that it would require to supply the good or service. The firm weighs the benefits of a higher payment if it wins against the reduced probability of winning. For general information about different types of auctions, see Vernon Smith, "Auctions," in *The New Palgrave: Allocation, Information and Markets*, edited by J. Eatwell, M. Milgate, and P. Newman, The MacMillan Press Limited: Hong Kong, 1989. See also Paul Milgrom, *Auctions and Bidding: A Primer*, 3 J. Econ. Persp. 10 (1989).

<sup>207</sup> 47 U.S.C. § 214(e)(1)(B).

<sup>208</sup> We note that there had been a continuing dialogue between GTE's economic consultant, Stanford Professor Paul Milgrom, and Ameritech's economic consultants, Yale Professors Jeremy Bulow and Barry Nalebuff that led to modifications in the proposals submitted. See, e.g., *ex parte* summary from Charon Harris, GTE, to William Caton, FCC dated March 31, 1997 (*GTE March 31 ex parte*). The most detailed and current description of the GTE proposal is probably the summary submitted by GTE on June 21, 1997 (*GTE June 21 ex parte*).

<sup>209</sup> See, e.g., Letter from Celia Nogales, Ameritech, to William Caton, FCC, dated May 2, 1997.

<sup>210</sup> Letter from Richard Steinberg, University of Cambridge, to Evan Kwerel, FCC, dated June 23, 1997 (A Combinatorial Auction with Multiple Winners for COLR, June 9, 1997) (Kelly-Steinberg). See <http://www.statslab.cam.ac.uk/~frank/AUCTION/>.

## F. Ordering Carriers to Provide Service

115. We seek comment on the ramifications of ordering a carrier to provide service in an unserved area. We tentatively conclude that this requirement entails an obligation to deploy the facilities necessary to provide the services supported by federal universal service support mechanisms, to offer the services to all customers requesting service in the designated area, and to advertise the availability of such service throughout the service area. These requirements are consistent with the language in section 214(e)(3) of the Act, stating that the carrier ordered to provide service shall meet the requirements of section 214(e)(1) of the Act.<sup>211</sup> We seek comment on this tentative conclusion.

116. We also seek comment whether additional measures may be necessary to ensure that the carrier ordered to provide service is able to earn an appropriate return on its investment. For example, a carrier may deploy facilities, advertise the availability of services and offer service to all customers and yet an inadequate number of customers may subscribe to the service, rendering the operation unprofitable. This result may occur due to faulty estimations by the carrier, but it may also be the result of unpredictable demand. Similarly, it is possible that carriers may provide services to all requesting customers, yet the customers might default on their bills. If the carrier is ordered to provide service, to what extent must it retain customers who cannot pay overdue debts or with poor credit records? How will the carrier recover its investment on the facilities deployed to provide service to subscribers who do not pay their bills? We seek comment on these issues, including the appropriate role for the Commission and state commissions to play in addressing these issues.

## VI. UNDERSERVED AREAS

117. In this section of the Further Notice, the Commission considers whether additional support for low-income consumers is necessary to promote subscribership in unserved and underserved areas, including tribal and insular areas.

### A. Defining “Underserved Area”

118. In the *Thirteenth Order on Reconsideration*, the Commission observed that there may be inadequately served areas that are characterized by extremely low penetration, low population density, and high costs.<sup>212</sup> We seek comment on the need for the Commission to establish a definition of “underserved area” that would be used in targeting supplemental universal service support to those areas. For example, a community may be considered underserved if the penetration rate of the community is significantly below the national average. In addition to the number of supported services available, and the percentage of the population receiving those supported services, there may be other identifying characteristics that describe an underserved area. We seek comment on an appropriate definition for underserved area. For

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<sup>211</sup> 47 U.S.C. §§ 214(e)(3) and 214 (e)(1). Pursuant to section 214(e)(1), to be designated as an eligible telecommunications carrier, a carrier must: (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and (B) advertise the availability of such services and the charges therefor using media of general distribution.

<sup>212</sup> *Thirteenth Order on Reconsideration* at para. 92.

example, we could define underserved area as a geographic area that meets certain statistical benchmarks, *i.e.*, a penetration rate below a certain percentage, a population density below a certain level, costs of providing supported services above a certain level, etc. We also seek comment on whether there is sufficient, readily available statistical data to make such a definitional approach viable.

### **B. Expanding LinkUp to Include Facilities-Based Charges**

119. We seek comment on whether increasing federal support to offset initial connection charges may be necessary to increase the success of our universal service support mechanisms in underserved areas, including insular and tribal lands. In the proceeding leading up to the *Second Recommended Decision*, the Arizona Corporation Commission (Arizona Commission) submitted a proposal to use a portion of federal support to address the problem of unserved areas and the inability of low-income residents to obtain telecommunications service because they cannot afford to pay the required line extension or construction costs.<sup>213</sup> The Arizona Commission's proposal was not intended to be a comprehensive alternative to the high-cost fund distribution model, but rather to address a discrete concern related to low-income residents in remote areas. We seek comment on the Arizona Commission's proposal and the extent to which the problem identified by the Arizona Commission is widespread. In particular, we seek further data on the cost of line extensions in rural areas and regarding the number of residents that are deprived of telecommunications services because of high line extension or construction costs and areas in which this problem is acute.

120. The Joint Board recognized that investments in line extensions historically have been an issue addressed by the states through intrastate proceedings that establish reasonable rates for line extension agreements and encourage carriers to minimize unserved regions of the states.<sup>214</sup> The Joint Board suggested that these issues should continue to be dealt with by states, to the extent that the states are able to do so.<sup>215</sup> We note that regulators generally require carriers to use rate averaging to reduce the rates for their highest-cost customers in rural and insular areas, but those regulators often still permit carriers to charge particularly isolated customers a supplementary "initial connection" charge for installing a new line. Moreover, while regulators also generally require carriers to amortize the cost of installing new lines, if there is a reasonable chance that those lines will not be used over their full life-span, regulators often permit carriers to charge most, if not all, of the initial connection charge up front. These charges can be prohibitive.<sup>216</sup> We seek comment on whether states have the ability to address this problem, or, in the alternative, whether federal assistance, in some instances, may be necessary.

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<sup>213</sup> Proposal of the Arizona Corporation Commission For Distribution of Federal USF Funds to Establish Service to Low-Income Customers in Unserved Areas, or in the Alternative, for Amendment of the May 8, 1997 Report and Order to Provide for Federal USF Distribution for This Purpose; (*received* April 28, 1998) (Arizona Proposal). This document is attached as an Appendix to paper copies of this Further Notice (Appendix E). Electronic copies of the Arizona Proposal can be obtained through the Commission's Electronic Comment Filing System: <https://gulfoss.fcc.gov/cgi-bin/ws.exe/prod/ecfs/comsrch.htm>.

<sup>214</sup> *Second Recommended Decision*, 13 FCC Rcd at 24764-24765.

<sup>215</sup> *Second Recommended Decision*. 13 FCC Rcd at 24765.

<sup>216</sup> See Navajo Communications Company, response to Arizona Corporation Commission Data Request, ACC Docket No. T-2115-97-640 (Unserved Areas), Jun. 19, 1998 at attachment B. This document was placed on the